

*** NOT FOR PUBLICATION ***

NO. 22562

IN THE SUPREME COURT OF THE STATE OF HAWAII

SONG HONG and HYANG HONG, Plaintiffs-Appellants

vs.

THE ESTATE OF RUTH GRAHAM, DECEASED, GRAHAM PROPERTIES, INC.,
CHARLOTTE GRAHAM, Defendants-Appellees

and

JONG HYE KIM, RICHARD DAGGETT REALTY, SENTINEL SILENT ALARM CO.,
INC., JOHN DOES 1-10, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS
1-10, and DOE ENTITIES 1-10, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 96-2593)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Nakayama J., and
Circuit Judge Watanabe, in place of Acoba, J. recused, and
Circuit Judge Pollack, assigned by reason of vacancy,
Dissenting, with whom Levinson, J., joins¹)

Plaintiffs-appellants Song Hong (Mr. Hong) and Hyang Hong (Mrs. Hong) [collectively, "the Hong"], appeal from the March 15, 1999 judgment of the circuit court of the first circuit, the Honorable Marie N. Milks presiding, that resulted from the circuit court's partial grant of summary judgment, issued March 20, 1998, the Honorable Kevin S.C. Chang presiding, and the circuit court's grant of summary judgment as to all remaining claims, issued November 4, 1998, the Honorable Allene K. Suemori presiding, all in favor of defendants-appellees the Estate of Ruth Graham (Ruth Graham), Graham Properties, Inc.,

¹ The majority disposition issued because of the imminent retirement of Judge Watanabe. The dissent will follow.

*** NOT FOR PUBLICATION ***

and Charlotte Graham [collectively, "the Grahams"]. The claims asserted in this appeal arise from an incident that occurred on July 1, 1995, in which Mr. Hong was shot in the head during a robbery of the pawn shop that the Hong's operated on premises leased to them by Ruth Graham and the undisputed fact that Ruth Graham failed to inform the Hong's about two prior robberies that had occurred on the leased premises within the previous year.

On appeal, the Hong's argue that the circuit court erred in granting partial summary judgment on the claims for negligence and loss of consortium based on the absence of a duty because (1) it failed to consider the duty to disclose, as opposed to the duty to protect against, criminal acts of third parties, and (2) Restatement (Second) of Torts § 302B (1965),² Restatement (Second) of Torts § 551 (1977)³ and Hawai'i Revised Statutes

² Restatement (Second) of Torts § 302B provides in relevant part that "[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." Restatement (Second) of Torts § 302B is a special application of the rule in clause (b) of Restatement (Second) of Torts § 302, which provides in relevant part:

A negligent act or omission may be one which involves an unreasonable risk of harm to another through either:

- (a) the continuous operation of a force started or continued by the act or omission, or
- (b) the foreseeable action of the other, a third person, an animal, or a force of nature.

³ Restatement (Second) of Torts § 551 provides in relevant part:

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the

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*** NOT FOR PUBLICATION ***

(HRS) § 467-14(18) (Supp. 2002)⁴ all serve as bases for imposing a duty on a lessor to disclose prior criminal acts of third parties that have occurred on the leased premises. The Hongs also argue that the circuit court erred in granting summary judgment on the claims for breach of contract because, by failing to disclose the prior robberies that occurred on the leased premises, Ruth breached (1) her contractual duty of good faith and fair dealing, (2) the implied warranty of habitability, and

³(...continued)

transaction is consummated,

- (a) matters known to him that the other is entitled to know because of a fiduciary duty or other similar relation of trust and confidence between them; and
- (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and
- (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and
- (d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and
- (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

⁴ HRS § 467-14(18) provides in relevant part:

Revocation, suspension, and fine. In addition to any other actions authorized by law, the commission may revoke any license issued under this chapter, suspend the right of the licensee to use the license, fine any person holding a license, registration, or certificate issued under this chapter, or terminate any registration or certificate issued under this chapter, for any cause authorized by law, including but not limited to the following:

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- (18) Failing to ascertain and disclose all material facts concerning every property for which the licensee accepts the agency, so that the licensee may fulfill the licensee's obligation to avoid error, misrepresentation, or concealment of material facts .
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(c) the implied warranty of quiet enjoyment.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that the Hongs waived all of their arguments with respect to an alleged duty to disclose by: (1) failing to assert the arguments regarding Restatement (Second) of Torts § 551 and HRS § 467-14(18) during trial court proceedings, see Bitney v. Honolulu Police Dept., 96 Hawai'i 243, 251, 30 P.3d 257, 265 (2001) (citations and brackets omitted) ("Appellate courts will not consider an issue not raised below unless justice so requires."); HRS § 641-2 (1993) ("The supreme court may correct any error appearing on the record, but need not consider a point which was not presented in the trial court in an appropriate manner."); and (2) failing to set forth an argument in compliance with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7),⁵ inasmuch as bare assertions that a special relationship need not exist to impose a duty, without legal argument as to how Restatement (Second) of Torts § 302 serves as a basis for imposing a duty, are insufficient where Restatement (Second) of Torts § 302 by itself does not create or establish a legal duty, see McKenzie v.

⁵ HRAP Rule 28(b)(7) provides in relevant part:

(b) Opening brief. Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:

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- (7) The argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. . . . Points not argued may be deemed waived.

*** NOT FOR PUBLICATION ***

Hawai'i Permanente Medical Group, Inc., 98 Hawai'i 296, 300, 47 P.3d 1209, 1213 (2002) ("Restatement (Second) § 302 by itself does not create or establish a legal duty; it merely describes a type of negligent act."). We further hold that the circuit court did not err in granting summary judgment on the claims for breach of contract, as: (1) the Hong's' allegation concerning the formation of the lease (i.e., that the failure to disclose prior criminal acts of third parties induced the Hong's to enter into the lease) does not bring the conduct within the scope of the duty of good faith and fair dealing, see Best Place, Inc. v. Penn America Ins. Co., 82 Hawai'i 120, 124-25, 920 P.2d 334, 338-39 (1996) (citing Restatement (Second) of Contracts § 205 (1979)) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."). (Emphasis added.); (2) the implied warranty of habitability has not yet been extended to commercial leases, and in light of the fact that the lease in this case does not provide an express provision requiring the lessor to disclose prior criminal acts of third parties and no novel arguments have been presented as to why an immediate extension is warranted, we decline at this time to extend the warranty to commercial leases, see Cho Mark Oriental Food, Ltd. v. K & K Intern., 73 Haw. 509, 525 n.1, 836 P.2d 1057, 1066 n.1 (1992) (declining to extend the warranty of habitability to commercial leases where only a few other jurisdictions have done so, and, in those cases, the subject lease expressly provided that the lessor would furnish the disputed service); and (3) pursuant to the express covenant of quiet enjoyment in the lease (as opposed to the implied covenant argued by the Hong's),

*** NOT FOR PUBLICATION ***

which read as follows:

QUIET ENJOYMENT. Upon the payment of the Lessee of the rent as aforesaid and upon observance and performance of the covenants by the Lessee herein contained, the Lessor shall permit the Lessee to peaceably hold and enjoy the premises for the term hereby demised without hindrance or interruption by the Lessor or any person or persons lawfully or equitably claiming by, through or under the Lessor, except as otherwise expressly provided herein[,]

the Hong's do not assert actions by the lessor, or those lawfully or equitably claimed by, through, or under the lessor, that hindered or interrupted the Hong's' justified expectations regarding the use and possession of the leased premises. Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, May 30, 2003.

On the briefs:

Ronald G.S. Au,
for plaintiffs-appellants
Song Hong and Hyang Hong

Brenda Morris Hoernig,
for defendants-appellees
The Estate of Ruth Graham,
Charlotte Graham, and
Graham Properties, Inc.